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Book Reviews

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BOOK REVIEWS

FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW. By Martin Shapiro.[1] Englewood Cliffs: Prentice-Hall. 1966. Pp. viii, 182. $4.95.

Proponents of judicial restraint in free speech cases come off second best in Professor Shapiro's explanation of the role of the Supreme Court in these cases. He emphasizes that the Supreme Court has many roles and shows that different considerations are involved in the various roles. For example, judicial restraint, or judicial modesty as Shapiro likes to call it, may be quite proper in matters of social legislation, but he submits that in free speech cases it may be merely an excuse that the court uses to shirk its duty.

Shapiro, a political scientist, prefers to support his thesis not on philosophical, moral, legal, or historical grounds but rather with political arguments. These arguments are a valuable contribution towards a resolution of the controversy which flares up from time to time over the propriety of the Court's decisions concerning freedom of speech, since one of the principal attacks that is made on judicial activism is a political one. This attack is based on the view that activism violates the doctrine of the separation of powers and frustrates the will of the majority and thus is undemocratic. The views of Judge Learned Hand and Justice Frankfurter favoring restraint are given due consideration as are the contrary views of Justices Black and Douglas and Professor Charles Black. Shapiro supplies a helpful summary of these competing views with ample references to writers other than those named. He does strive mightily to present fairly the case of the modest despite his conclusion that they are in error.

The modest suffer from an uneasy feeling that it is undemocratic to declare an act of Congress invalid as violating the First Amendment. This uneasiness evidently has been felt by the Supreme Court, for the Court from John Jay to Fred M. Vinson never declared an act of Congress invalid as violating the First Amendment. There is, as Shapiro points out,[2] only one case in the books, namely, *Lamont v. Postmaster General*,[3] in which the Supreme Court declared a statute of the United States unconstitutional on First Amendment grounds, and that was decided as late as 1965. As is well known, the Court has been much bolder in the case of state action held violative of First Amendment freedoms as guaranteed by the Fourteenth Amendment.

Shapiro argues that the uneasiness felt by the modest can be cured by demonstrating to them that they apply naive views of majority rule when considering legislative enactments. Shapiro gives a clear analysis of the legislative process and of the functioning of administrative agencies with a view to showing how unresponsive these various bodies actually are to popular demands. He explains what he calls the constituencies of these various bodies. The committees of Congress, departments, commissions, and bureaus, it would seem, have their special lobbies, or what used to be called interests. It is these minorities

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2 Text at 123.
3 381 U.S. 301 (1965).

which they represent and respond to far more frequently than they do to any amorphous majority.

Shapiro explains that the Supreme Court also has its constituencies — certain minorities or groups that are hardly represented in the other branches of the government, if at all. However, he points out, following Mr. Dooley, that in the main the Court *is* responsive to the majority, and he holds it to be, in view of its limited power, not undemocratic.

The power of the Court has been greatly exaggerated because it is spoken of as the third branch of the government, coordinate with the legislative and executive branches. This notion is unrealistic, he points out, because it does not correspond with the facts of contemporary government. The Court, Shapiro feels, simply does not possess the pervasive power that the legislative and executive branches enjoy.

Having concluded that there is no merit to the argument against judicial activism on the grounds that such conduct is contrary to democratic principles, Shapiro explains why groups that are underrepresented in the other branches of the government should, in accordance with democratic principles, receive the protection of the First Amendment at the hands of the Court — they will receive this protection from no one else. To preserve government responsive to the majority, the Court must exercise the power of judicial review in First Amendment cases. Shapiro advocates the preferred position of freedom of speech and to that end recommends that the clear and present danger test be revived. His discussion of the clear and present danger test is particularly lucid and should prove to be of great interest to the legal profession.

This is a very useful book, and Professor Shapiro's approach to the controversial subject matter may well prove to be influential.

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JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION. By Fowler Harper. Indianapolis: Bobbs-Merrill. 1965. Pp. xxv, 406. $6.95.

This is the first and probably the last book on Mr. Justice Rutledge. There is an endless proliferation of works on Supreme Court Justices like Holmes, Brandeis, Frankfurter, Black, Douglas, and, at present, Chief Justice Warren. Justice Rutledge has been neither a recipient of comparable publicity nor the subject of detailed analysis. One reason for this is that his death in 1949 gave him only six years to write the opinions on which future judgments of him would be based. The significance of this becomes even more apparent when one thinks of the opinions of the above-mentioned Justices which would be excluded if only the opinions from their first six years on the Court were considered. Another reason for the absence of a book length treatment of Justice Rutledge is — as Professor Harper himself contends — that the Justice lacked the literary skill and flamboyance which have made so many Court opinions understandable and interesting to audiences outside the legal profession.

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In *Justice Rutledge and the Bright Constellation,* Professor Harper begins with a brief biographical sketch of the Justice's earlier years. It appears that Rutledge, Kentucky born and bred, was at one time afflicted with the South's prejudices against Negroes. According to Professor Harper, the Justice had occasion to correct his wife when she used the title "Mr." in addressing a Negro. Young Rutledge informed her that Negroes were not to be addressed as "Mr." or "Mrs." but by their first names only. He was quickly corrected by Mrs. Rutledge, and her views seemed to have had an impact on the Justice's thinking. Indeed, Professor Harper points out that Justice Rutledge's opinions on school desegregation to some degree presaged the landmark decision of *Brown v. Board of Education.*[1]

Once Professor Harper starts to discuss the Justice's opinions, it becomes clear that it is not really feasible to discuss Rutledge's work of six short years without considerable reference to constitutional law decisions which have been handed down subsequent to 1949. Only when the author compares the Rutledge opinions with what has followed can a proper judgment be made about the former's value.

Certainly no stand taken by Justice Rutledge while on the Court proved more controversial than his claim that the rights contained in the First Amendment were to be held in a "preferred position." Professor Harper says:

> The phrase "preferred position" of First Amendment rights has been used by the Court from time to time to suggest the important difference [from legislative restrictions on business and industry] involved. Justice Douglas, for example, spoke for the majority in one of the later Jehovah Witnesses cases. "Freedom of press, freedom of speech, freedom of religion, are in a preferred position," he wrote. Justice Jackson in the second flag salute case used language substantially the equivalent and even Justice Roberts in an opinion in which Justice Frankfurter joined declared, "mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." The case involved the right to distribute hand bills on the street.
>
> But just what is here implied? It is still not altogether clear. Certainly the heavy presumption of constitutionality involved in the objective test of reasonableness would appear to be significantly modified. But to what extent? Is there a presumption of invalidity of laws which abridge freedom of speech or of the press, or which pertain to an establishment of religion or the free exercise thereof? Certainly it can be said that whatever the label means as a technical doctrine, the Court is to scrutinize encroachments on First Amendment freedoms far more closely than limitations on freedom to make money. Free enterprise in the dissemination of ideas has far wider scope than free enterprise in business.[2]

Professor Harper contends that Justice Holmes' "clear and present danger" formula gave birth to the "preferred position" idea. There is no stronger statement of the preferred position theory than Justice Rutledge's opinion in *Thomas*

1 Brown v. Board of Education, 347 U.S. 483 (1954).
2 HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 99-100 (1965).

v. Collins.[3] The case presented a challenge to a Texas statute requiring union organizers to be licensed before soliciting members. In *Thomas* Justice Rutledge said the following:

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights [First Amendment rights] rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending.[4]

The freedom of association cases which derive from *NAACP v. Alabama*[5] and the language contained therein, seem to draw heavily upon the above-quoted portion of *Thomas*.

Professor Harper discusses Justice Rutledge's contributions in the area of due process of law and the rights of naturalized citizens, and he notes the impact of these contributions on contemporary judicial thought. While here, as elsewhere in this biography, the relatively short discussion of Justice Rutledge himself makes one wonder just what the subject of the book is, the treatment of the Supreme Court personalities involved in such cases gives the Justice distinctive dignity and stature. Amidst the swirling controversies between Justices Jackson and Black, Rutledge seems to have maintained his equilibrium and avoided the temptation to take sides, thus preserving that dignity which is essential to an institution such as the Supreme Court which relies on respect.

While the Rutledge opinions now remembered are not those that assume primary importance in the constitutional law textbooks, he was at the center of an intellectual debate which provided much of the material that was utilized in the subsequent Black-Frankfurter arguments.

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3 Thomas v. Collins, 323 U.S. 516 (1945).
4 *Id.* at 530.
5 357 U.S. 449 (1958).
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BOOKS RECEIVED

THE AMERICAN JURY. By Harry Kalven, Jr., Professor of Law, University of Chicago, and Hans Zeisel, Professor of Law and Sociology, University of Chicago. Over 3,500 jury trials have been examined to determine how differently judge and jury would decide the same cases. Boston: Little, Brown & Co. 1966. Pp. x, 559. $15.00.

AN ANCIENT PARTNERSHIP: LOCAL GOVERNMENT, MAGNA CARTA, AND THE NATIONAL INTEREST. By John E. Bebout, Director, Urban Studies Center, Rutgers. Charlottesville: The University Press of Virginia (for the Magna Carta Commission of Virginia). 1966. Pp. 93. $ .75.

ATTORNEY'S GUIDE TO MEDICINE IN LAW. By Joseph A. Manzella, M.D. A single-volume guide for uses involving medical records, testimony, evidence, and witnesses. Englewood Cliffs: Prentice-Hall. 1966. Pp. xviii, 334. $25.00.

BEHIND CLOSED DOORS: POLITICS IN THE PUBLIC INTEREST. By Edward N. Costikyan. A candid and combative Reform Democrat who was Leader of Tammany Hall explains the nature of modern urban politics. New York: Harcourt, Brace & World. 1966. Pp. xi, 369. $6.95.

CASES AND MATERIALS ON FAMILY LAW. By Caleb Foote, Professor of Law in Criminology, University of California, Berkeley; Robert J. Levy, Professor of Law, University of Minnesota; and Frank E. A. Sander, Professor of Law, Harvard University. A thorough examination of the law of Domestic Relations. Boston: Little, Brown & Co. 1966. Pp. xxv, 1005. $14.00.

COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES. By Herbert R. Northrup, Chairman, Department of Industry, Wharton School of Finance and Commerce. An analysis of the experiences of those who have tried compulsory arbitration and the shortcomings they discovered. Washington: Labor Policy Association. 1966. Pp. ix, 449. $7.00.

COMPUTERS & THE LAW — AN INTRODUCTORY HANDBOOK. Prepared by the Special Committee on Electronic Data Retrieval, American Bar Association. This handbook introduces the legal profession to the data processing machinery which already permeates our society. Chicago: Commerce Clearing House. 1966. Pp. ix, 150. $5.00.

CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL. By Donald J. Newman, Professor of Social Work, University of Wisconsin. The entire guilty plea process is examined. Boston: Little, Brown & Co. 1966. Pp. xxvii, 259. $8.50.

CRIME LAW AND SOCIETY. By Frank E. Hartung, Professor in the Research Center for the Study of Crime, Delinquency, and Corrections, Southern Illinois University. Professor Hartung rejects the psychiatric theory of criminality and, in terms of normality, explains offenses widely held to be pathological. Detroit: Wayne State University Press. 1965. Pp. 320. $9.75.

DISSENTER IN A GREAT SOCIETY: A CHRISTIAN VIEW OF AMERICA IN CRISIS. By William Stringfellow. A frontal attack on the complacency of the American consensus. The author explores the relationship between poverty and property in the U.S., the ideological crisis in our politics, and the continuing war between the races, all seen as the arena of the Christian life. New York: Holt, Rinehart, and Winston. 1966. Pp. x, 164. $4.95.

ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER. Edited by Morris D. Forkosch. Published under the auspices of the Northeastern States Branch of the American Society for Legal History. In the main, the contributors to this volume wrote for, and not necessarily of, the Justice. Indianapolis: Bobbs-Merrill. 1966. Pp. xix, 647. $17.50.

AN ESTATE PLANNER'S HANDBOOK. 3d ed. By James F. Farr. This completely revised edition gives up-to-date coverage of all phases of estate planning. Boston: Little, Brown & Co. 1966. Pp. xxiv, 663. $15.00.

FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW. By Martin Shapiro, Associate Professor of Political Science, University of California. Dr. Shapiro, in analyzing free speech cases, outlines the positions of the opposing forces of judicial activism and judicial modesty and strongly argues in favor of the former. Englewood Cliffs: Prentice-Hall. 1966. Pp. viii, 182. $4.95.

FREEDOM, THE INDIVIDUAL AND THE LAW. By Harry Street, Professor of Law, Manchester University. A survey of the present content of civil liberties in England. Baltimore: Penguin Books. 1963. Pp. 316. $1.45 (Paperback).

THE GOOD SAMARITAN AND THE LAW. Edited by James M. Ratcliffe, Assistant Dean of the University of Chicago Law School. In the main, the essays in the book are taken from the University of Chicago's "Conference on the Good Samaritan and the Bad," held last year. Garden City: Doubleday & Co. 1966. Pp. xv, 300. $1.45 (Paperback).

GOVERNMENTAL REGULATION OF BUSINESS. By Jesse S. Raphael, Professor of Law, New York Chapter, American Institute of Banking. A layman's guide to the methods and practices of governmental regulatory agencies. New York: The Free Press. 1966. Pp. x, 260. $6.95.

THE GOVERNMENT-SUBSIDIZED UNION MONOPOLY. By Joseph H. Ball. This study of labor practices in the shipping industry, by a former United States Senator, finds unrestrained union power greatly weakening U.S. flag shipping. Washington, Labor Policy Association. 1966. Pp. viii, 304. $7.00.

HOW TO AVOID PROBATE. By Norman F. Dacey. In this best seller, the author labels the present probate system a racket and concludes the reader would be better advised to engage in his own estate administration by utilizing the several hundred sample trust instruments included in the book. New York: Crown Publishers. 1965. Pp. 341. $4.95.

THE IDEA OF LAW. By Dennis Lloyd, Quain Professor of Jurisprudence, University College, London. A discussion of law vis-à-vis man's conception of his relation to society. Baltimore: Penguin Books. 1964. Pp. 363. $1.45 (Paperback).

AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY. By Wolfgang Kunkel, Professor of Roman Law at the University of Munich. An introductory work for the study of general Roman history as well as classical Roman Law. London: Oxford University Press. 1966. Pp. x, 217. 35s. net.

JUSTICE IS A WOMAN. By Dorothy A. Smith. The author claims that much of the dissatisfaction over the present status of women is erroneous, and that the quest for equality could, in fact, erode their present privileged position. Philadelphia: Dorrance & Co. 1966. Pp. vii, 190. $4.00.

JUSTICE IN JERUSALEM. By Gideon Hausner. The author, who was Attorney General of Israel when Adolf Eichmann was brought to trial, tells of his role in preparing and conducting the prosecution's case. New York: Harper & Row. 1966. Pp. xiii, 528. $12.50.

LABOR ARBITRATION: A DISSENTING VIEW. By Hon. Paul R. Hays, United States Court of Appeals for the Second Circuit. Labor arbitration is a private system of justice, says the author, and the courts should not be called upon to lend their enforcement powers to it. New Haven: Yale University Press. 1966. Pp. vii, 125. $4.50.

THE LABOR ARBITRATION PROCESS. By R. W. Fleming. Mr. Fleming, Chancellor of the University of Wisconsin's Madison Campus, and President of the National Academy of Arbitrators, analyzes the history, practice, and future of labor arbitration. Urbana: University of Illinois Press. 1965. Pp. 233. $5.00.

LAW AND COMPUTERS IN THE MID-SIXTIES. Prepared by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. This publication is a transcript of a three-day Course of Study on law and computers sponsored by the Joint Committee. Philadelphia: The Joint Committee. 1966. Pp. 390. $20.00.

LAW AND CONSCIENCE. By Franz Böckle, Professor, University of Bonn. Father Böckle provides an explanation of the fundamental principles behind the differences in Protestant and Catholic ethical theology and attempts to answer those who question the validity of Catholic moral theology. New York: Sheed and Ward. 1966. Pp. 139. $3.75.

LAW AND PSYCHIATRY: COLD WAR OR *Entente Cordiale*. By Sheldon Glueck. This book consists of a series of four lectures delivered in 1962 under the Isaac Ray Award of the American Psychiatric Association. The author examines fundamental dilemmas involved in the relationship of law and psychiatry, discusses the area's basic legal decisions, and presages the relationship's potential. Baltimore: The Johns Hopkins University Press. 1966. Pp. ix, 181. $1.95.

LAW AND THEOLOGY. Edited by Andrew J. Buehner. Addresses at the dedication of Wesemann Hall, Valparaiso University, and essays on "The Professional Responsibility of the Christian Lawyer." Saint Louis: Concordia. 1965. Pp. 104. $1.00 (Paperback).

LAW IN A CHANGING SOCIETY. By Wolfgang Friedmann, Professor of Law and Director of International Legal Research, Columbia University. An examination of how social change has been admitted by, or at times challenged by, legislature and judiciary. Baltimore: Penguin Books. 1959, 1964. Pp. 475. $1.65 (Paperback).

THE LAWYER IN MODERN SOCIETY. By Vern Countryman, Professor, Harvard Law School, and Ted Finman, Associate Professor, University of Wisconsin Law School. This collection of cases and materials dealing with professional responsibility emphasizes not only the responsibility of the lawyer as a practitioner but explores his further obligations to the legal system and the society in which it functions. Boston: Little, Brown & Co. 1966. Pp. xxii, 911. $13.00.

LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT. By Michael I. Sovern, Professor of Law, Columbia University. The author provides a comprehensive guide to the laws against the racial discrimination which occurs through the practices of employers and unions. New York: The Twentieth Century Fund. 1966. Pp. ix, 270. $6.00.

A LIFE IN MY HANDS. By J. W. Ehrlich. The autobiography of a noted criminal lawyer. New York: Ballantine Books. 1965. Pp. 350. $ .75.

THE NORMAN CONQUEST AND THE COMMON LAW. By George W. Keeton, Professor of English Laws and Head of the Department of Laws at University College, London. A nontechnical explanation of the extent of change in the development of English Law attributable to the Norman Conquest. New York: Barnes & Noble. 1966. Pp. 238. $6.00.

OF MEN AND NOT OF LAW. By Lyman A. Garber. The author charges that the appellate courts, by acting on their views as men and not as interpreters of law, have undermined the foundations on which America is built. New York: The Devin-Adair Company. 1966. Pp. 196. $3.95.

OPINION OF THE COURT. By William Woolfolk. In this novel, a newly appointed Supreme Court Justice finds himself involved with politics, passion, and principles. Garden City: Doubleday and Company. 1966. Pp. 496. $5.95.

ORIGINS OF THE COMMON LAW. By Arthur A. Hogue, Associate Professor of History in the Graduate School, Indiana University. Written to provide the student, and the reader untrained in law, with the historical background of our present legal system. Bloomington: Indiana University Press. 1966. Pp. xii, 276. $6.50.

PATHWAY TO JUDGMENT: A STUDY OF EARL WARREN. By Luther A. Huston. A biography and an appraisal of the Chief Justice. Philadelphia: Chilton Books. 1966. Pp. ix, 197. $5.95.

THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY. By Royce Hanson, Associate Professor of Government and Public Administration, The American University. The author's concern is not with the technical aspects of apportionment standards, or court decisions, but with the significance of the subject as it demonstrates the operation of our political system in meeting an issue such as reapportionment. Englewood Cliffs: Prentice-Hall. 1966. Pp. xii, 143. $4.95 (clothbound) and $1.95 (paperback).

PRINCIPLES AND PRACTICE FOR THE LEGAL SECRETARY. By Marian Cornell and Kenneth Heafield. Explains the work of a lawyer and how a secretary may more efficiently serve him. Mundelein: Callaghan & Company. 1965. Pp. xi, 209.

ROMAN LITIGATION. By J. M. Kelly. A series of short, connected studies in which the author examines the realities of Roman litigation. He finds equal justice was impaired by the exploitation of the advantages possessed by the more powerful of the litigants. London: Oxford University Press. 1966. Pp. viii, 176. 42s. net.

RUSH TO JUDGMENT. By Mark Lane. A best selling critique of the Warren Commission's inquiry. New York: Holt, Rinehart and Winston. 1966. Pp. 478. $5.95.

SAFETY LAST: AN INDICTMENT OF THE AUTO INDUSTRY. By Jeffrey O'Connell, Professor of Law, University of Illinois, and Arthur Myers. This book contends that the automobile manufacturers have determinedly fought legislation and public pressure to build safer cars, and, instead, have attempted to shift the attention from their dangerous machines to the driver and the road. New York: Random House. 1966. Pp. vi, 226. $4.95.

SEARCH & SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION. By Jacob W. Landynski, Associate Professor of Political Science in the Graduate Faculty, New York School for Social Research. A historical and analytical treatment of the development of the Supreme Court doctrine on search and seizure. Baltimore: The Johns Hopkins Press. 1966. Pp. 286 x. $8.50.

SOCIAL DIMENSIONS OF LAW AND JUSTICE. By Julius Stone, Challis Professor of Jurisprudence and International Law, University of Sydney. This work covers the range of problems that confront modern democratic governments in seeking to use law as an instrument of social control and as a means toward achieving justice. Stanford: Stanford University Press. 1966. Pp. xxxv, 933. $18.50.

SMALL PROPERTY OWNER'S LEGAL GUIDE. By Hyman Sukloff, Deputy Assistant Corporation Counsel, Law Department, New York City. Written for the New York City property owner. New York: Arco. 1965. Pp. 112. $3.95.

SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES. Introduction and analysis by Harold J. Berman, Professor of Law, Harvard University. An English translation of the Criminal Code and Code of Criminal Procedure for the largest of the Soviet Republics. The Codes, adopted in 1960, are among the chief products of the Soviet law reform movement which began after Stalin's death. Professor Berman's long introductory essay includes a listing of the major changes in the law, an analysis of the Codes' significance, and a comparison of the Codes with the criminal laws of Western Europe and the United States. Cambridge: Harvard University Press. 1966. Pp. vii, 501. $11.95.

STRATEGIC POWER AND SOVIET FOREIGN POLICY. By Arnold L. Horelick and Myron Rush. This study discusses the interrelation of strategic military power and Soviet foreign policy since intercontinental nuclear armed missiles made strategic weapons seem too destructive to employ militarily, yet too dangerous to ignore in international political calculations. Chicago: The University of Chicago Press. 1966. Pp. viii, 225. $5.95.

UNSAFE AT ANY SPEED. By Ralph Nader. This best seller charges that the main cause of auto deaths and injuries is automobiles that are unnecessarily dangerous. New York: Grossman Publishers. 1966. Pp. xi, 365. $5.95.

WORLD-FAMOUS TRIALS. By Charles Franklin. Accounts of twenty-two trials from Socrates to the Rosenbergs. New York: Taplinger. 1966. Pp. 320. $4.95.

The listing of a book in this section does not preclude its being reviewed in a subsequent issue of the LAWYER.

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